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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

No. 71-1596

COMMONWEALTH OF PENNSYLVANIA, et al.,
*Petitioners,*

v.

UNITED STATES OF AMERICA, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, R. D. Timpany, Trustee of the property of The Central Railroad Company of New Jersey (CNJ) submits this Brief in opposition to Petitioners' petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 10, 1972.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether this Court has jurisdiction of and should grant certiorari with respect to a dispute which events have rendered moot and to matters adjudicated, not in the order sought to be reviewed, but in an order presently on appeal to the Third Circuit.

## COUNTERSTATEMENT OF THE CASE

On December 20, 1971 the CNJ Reorganization Court entered Order No. 445 which, *inter alia,* directed CNJ to temporarily suspend on April 1, 1972 all operations in the Commonwealth of Pennsylvania pending final decision by the Interstate Commerce Commission on its abandonment application and stayed persons from instituting or maintaining actions affecting the operations (or the cessation or abandonment thereof) of the Debtor in the Commonwealth of Pennsylvania without first obtaining leave of the Reorganization Court to do so. Order No. 445 was entered after hearing (at which Petitioners offered negligible proofs) on a petition for instruction (App. 1a-6a) concerning further borrowing of funds on guaranteed trustee's certificates. The petition had raised serious questions as to the propriety of continued borrowings to finance projected loss operations in view of delays and uncertainties that had arisen concerning the implementation of the estate's program to transform the CNJ into a viable railroad—a program which had as its heart the abandonment of Pennsylvania operations which had only been adopted after approval by the Secretary of the Department of Transportation in consultation with the Interstate Commerce Commission pursuant to the Emergency Rail Services Act of 1970, 45 U.S.C.A. 661 et seq, and after extensive litigated adversary proceedings resulting in a final order binding upon Petitioners.

Thereafter Petitioners moved in the Reorganization Court, *inter alia,* for leave under Order No. 445 to maintain the action they had previously commenced in the United States District Court for the Middle District of Pennsylvania to review certain abandonment orders of the Interstate Commerce Commission. After full hearing the CNJ Reorganization Court entered Order No. 454 denying such motion (App. 7a). Petitioners filed a notice of appeal of Order No. 454. The appeal was docketed in the Third

Circuit on February 24, 1972 (Docket No. 72-1136); and no further action has been taken with respect to it.

On January 11, 1972 after full hearing pursuant to §77(o) of the Bankruptcy Act, the CNJ Reorganization Court entered Order No. 451 authorizing the abandonment of the operations and lines which had previously been authorized by orders of the Interstate Commerce Commission, which orders form the subject matter of the action referred to above brought by Petitioners in the Middle District of Pennsylvania.

On April 1, 1972 CNJ temporarily suspended its Pennsylvania operations. Prior to such suspension, the Interstate Commerce Commission had granted temporary authority to the Lehigh Valley Railroad to take over CNJ's Pennsylvania operations; and subsequently by order bearing service date of June 2, 1972 the Interstate Commerce Commission conditionally authorized the Pennsylvania abandonments and extensions sought by CNJ and Lehigh Valley. On April 6, 1972 CNJ abandoned the lines and operations forming the subject matter of Order No. 451.

## ARGUMENT

The temporary suspension of CNJ's operations occurred on April 1, 1972; and the propriety of such suspension has been subsequently confirmed by the Interstate Commerce Commission order bearing service date of June 2, 1972. The ten abandonments pursuant to Order No. 451 occurred on April 6, 1972. Disputes concerning such suspension or abandonments have now been mooted by the passage of time and intervening events. As such, a case or controversy is not presented; and this Court lacks jurisdiction to proceed.

The injunctive provisions of Order No. 445 reserve to the Reorganization Court decision as to the forum or forums in which litigation (including review of Interstate

Commerce Commission orders) affecting the subject matter of the order should be maintained or brought. It was an exercise of the inherent power of a court of equity to protect its own decrees and of the Reorganization Court's exclusive jurisdiction over the Debtor and its property wherever located. It provided for leave for litigations to be brought elsewhere upon a proper showing. Petitioners sought leave to maintain the action pending in the Middle District of Pennsylvania and were denied same by Order No. 454. Their proper quarrel, if any, is with that Order and not Order No. 445. They filed a notice of appeal from Order 454; and that appeal is pending in the Third Circuit and was not ruled upon by the Third Circuit in the judgments entered by it on March 10, 1972.

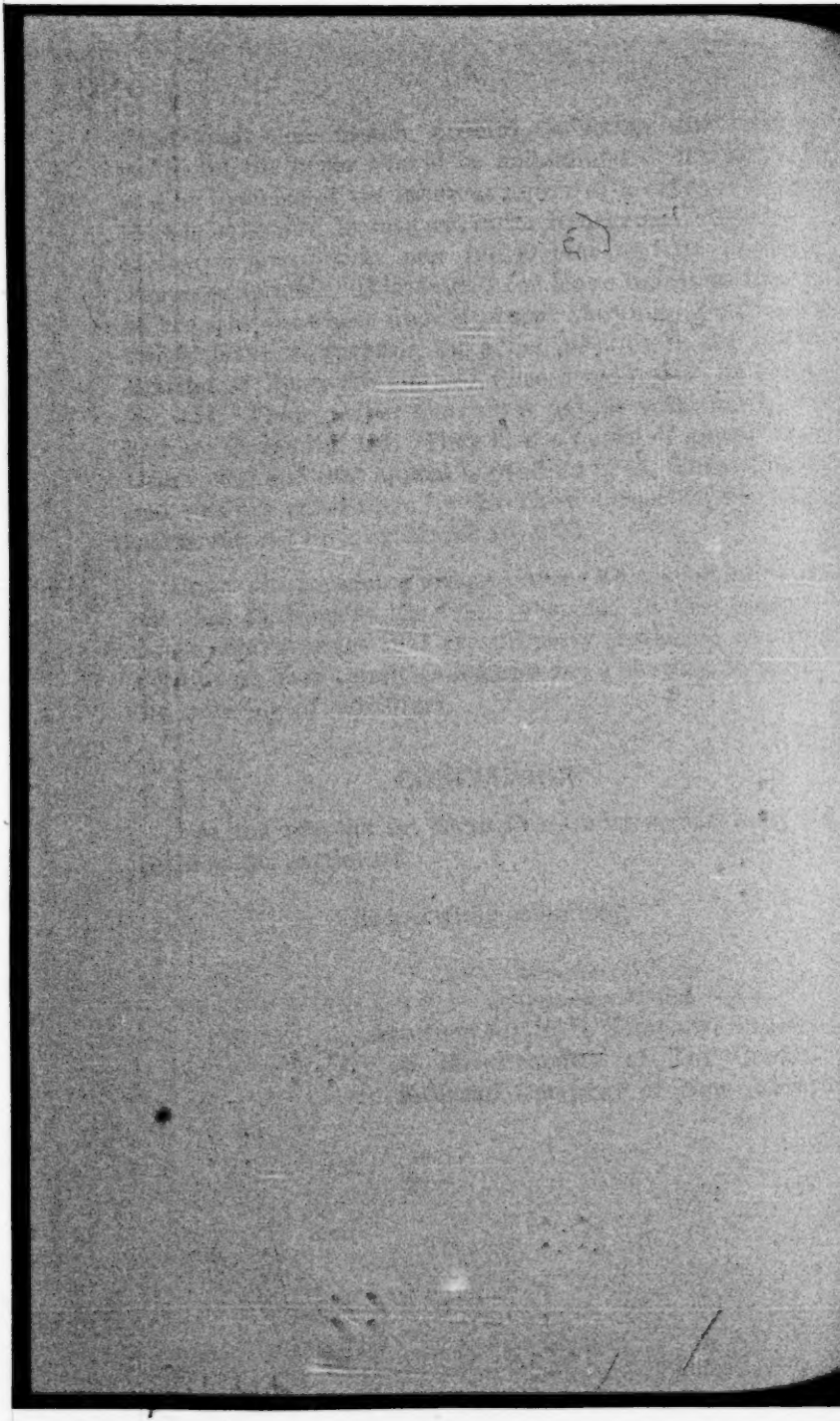
Under the foregoing circumstances we respectfully submit that Petitioners have not presented to this Supreme Court controversies that are properly justicable and that Petitioners have totally failed to make a showing to justify the granting of certiorari.

## CONCLUSION

For the reasons set forth this Court should deny the petition for certiorari.

Respectfully submitted,

STANLEY WEISS
STANLEY WEISS
Attorney for R. D. Timpany, Trustee
of the Property of The Central
Railroad Company of New Jersey



## APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

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|---|---|
| In the Matter of<br>THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,<br>Debtor. | In Proceedings for the Reorganization of a Railroad<br>No. B 401-67 |

## PETITION OF THE TRUSTEE FOR INSTRUCTIONS CONCERNING FURTHER BORROWING OF FUNDS ON GUARANTEED TRUSTEE'S CERTIFICATES

To: THE HONORABLE ANTHONY T. AUGELLI
Chief Judge
United States District Court
District of New Jersey

Your petitioner, R. D. Timpany, Trustee of the property of The Central Railroad Company of New Jersey, respectfully represents that:

1. On March 26, 1971 this Honorable Court entered Order No. 400 authorizing your petitioner to issue and sell guaranteed trustee's certificates up to $6,000,000 in principal amount, conditioning the expenditure of such funds upon further order of this Court.

2. On April 14, 1971 this Honorable Court entered Order No. 402 authorizing your petitioner to expend for certain purposes $2,500,000 of funds to be received from the sale of trustee's certificates.

3. To date your petitioner has drawn down $1,500,000 of the $2,500,000 authorized by Order No. 402; and based upon present estimates your petitioner believes that he will need further monies by November, 1971 if the Debtor is to continue operations thereafter.

4. Your petitioner believes that this Honorable Court entered Order No. 400 expecting, and in order to permit the Blueprint for Survival (Blueprint) to be implemented; and your petitioner requires instructions as to whether to borrow further monies against the sums authorized by Order No. 402 in view of the status of the implementation of the Blueprint.

5. Some progress has been made in the implementation of the Blueprint. Specifically:

(a) the Debtor has discontinued the major portion of its lighterage service and for all practical purposes has minimized the burdens of the coal dock;

(b) a 20% passenger fare increase has been authorized, though President Nixon's wage-price freeze has prevented its implementation;

(c) initial steps have been taken by the Debtor and labor—more specifically described in petitioner's letter to the Court and all parties dated September 1, 1971—to alleviate the burdens of the work rules;

(d) significant efforts are under way for the development of the Debtor's port properties;

(e) the Debtor's internal operations have been substantially revised in a manner that your petitioner believes makes it more responsive to the Debtor's problems.

The Debtor's losses have declined from the levels incurred last year and from those forecast for the first eight months

of the present year in the application to the federal Department of Transportation for guaranteed trustee's certificates.

6. Notwithstanding the foregoing, the Debtor's losses continue and are presently forecast by the Debtor to continue in substantial magnitude. Your petitioner is of the opinion that these losses will not and cannot be stopped without a restructuring of the configuration of the Debtor's lines such as is proposed in the Blueprint.

7. It is with respect to the restructuring of the configuration of the Debtor's lines that progress in the implementation of the Blueprint has been negligible. Your petitioner has been unable to date to cause arrangements to be consummated with other carriers and the Lehigh Coal and Navigation Company (LC&N) which would assure alternative rail services to the Debtor's Pennsylvania customers. While both the Lehigh Valley Railroad Company and Reading Company have indicated interest in providing alternative rail service (both having filed applications to the Interstate Commerce Commission (ICC) with respect to same) and while LC&N has expressed interest in obtaining a new lessee to provide such service, agreements have still not been reached. As a consequence, numerous shippers and the Commonwealth of Pennsylvania have vigorously protested the abandonments. The legal status of the abandonment proceedings is substantially as follows:

(a) on May 25, 1971 your petitioner, pursuant to Order No. 410, filed as abandonment application with the ICC seeking the necessary certificates by July 6, 1971;

(b) on August 19, 1971 your petitioner filed with the ICC a motion for interim relief seeking an order permitting the Debtor's immediate abandonment of its Pennsylvania operations and permitting the Lehigh

Valley Railroad Company and/or the Reading Company to provide alternative service pending ultimate resolution of the extent to and the terms upon which either or both of said carriers would be permanently authorized to provide such service;

(c) On August 20, 1971 the ICC issued a series of orders (bearing service date of August 24, 1971) permitting abandonments on ten of the segments involved covering 38 miles of line, most of which were out of service. As for the other twenty segments, the ICC issued an order establishing procedures for a prehearing conference scheduled to commence on October 4, 1971. True copies of the orders covering the ten segments on which abandonments were granted have recently been filed with the Court as exhibits to the petition of the Trustee for authority to abandon certain lines and operations. A true copy of the remaining order covering the other twenty segments is attached hereto as Exhibit A;

(d) subsequent to August 20, 1971 various petitions have been filed with the ICC by various parties seeking reconsideration of the orders issued August 20, 1971; and other papers have been filed alleging inadequacies in your petitioner's abandonment application and raising issues—such as, whether the Debtor's operation of the Pennsylvania lines is unprofitable—which it is claimed requires full hearing. Some parties have argued that there is no urgency in deciding the application in view of the as yet undisbursed funds potentially available from the sale of guaranteed trustee's certificates pursuant to Order No. 400.

8. The foregoing developments raise material risks to the prompt and effective implementation of the Blueprint. Under these circumstances, and particularly in view of the constitutional issues involved in the hearing giving rise to the entry of Order No. 400, there is a serious question as to

the propriety of continued borrowing of funds which the Debtor forecasts will be lost in further operations under its existing configuration. It is for this reason that your petitioner seeks instructions as to whether to exercise his authority to borrow funds for operations past November 1, 1971.

9. On the assumption that significant progress in the implementation of the Blueprint is not made in the course of the ICC proceedings scheduled to commence on October 4, 1971, the alternatives facing the estate of the Debtor appear to be as follows:

(a) to instruct the Trustee to continue to borrow in the hope that somehow, some way, and at some time a way will be found to either implement the Blueprint or to otherwise keep operating on a different program than that which formed the basis of the borrowing;

(b) to instruct the Trustee to continue borrowing but to limit his expenditures to those necessary for the maintenance of the New Jersey rail services which the Secretary of Transportation found were essential transportation services and which form the basis of the Blueprint for Survival. Such a course involves balancing the prohibitions contained in 49 U.S.C. 1(18)—(20) against the possible infringement of the constitutional rights of the creditors of the estate of the Debtor that may be involved in a continued operation on a basis other than projected in the Blueprint for Survival;

(c) to instruct the Trustee not to make further borrowings and to arrange for an orderly cessation of service. In this regard it should be recalled that the Emergency Rail Transportation Act of 1970, Order No. 400 authorizing the issuance of guaranteed trustee's certificates, and the underlying documentation on the guaranteed trustee's certificates financing, all give

to the Secretary of Transportation, in the event of actual or threatened cessation of the essential transportation services, the option to lease trackage rights over the lines of the Debtor and such equipment as may be necessary to provide the services which he has found to be essential—the terms to be subject to the approval of the reorganization court and the ICC but the provision of services not to await such approvals.

Your petitioner will have a recommendation as to a course to be followed at the time of the hearing on this petition based upon the then present circumstances.

WEREFORE, your petitioner prays that an order be entered instructing him upon the course or courses of action to be followed in the premises.

R. D. TIMPANY
R. D. TIMPANY
Trustee of the Property of
The Central Railroad Company of New Jersey

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STATE OF NEW JERSEY
COUNTY OF ESSEX } ss.:

R. D. TIMPANY, being duly sworn, deposes and says that he is the petitioner in the foregoing petition and that the statements contained therein are true according to the best of his knowledge, information and belief.

R. D. TIMPANY

Sworn to and subscribed
before me this 30th day
of September, 1971

ROSE A. FERRANTE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Apr. 7, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | |
|---|---|
| In the Matter of<br>THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,<br>Debtor. | In Proceedings for the Reorganization of a Railroad<br>No. B 401-67<br>Order No. 454 |

**ORDER DENYING APPLICATIONS BY THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA, PUBLIC UTILITY COMMISSION AND OTHER PARTIES.**

The Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the other parties plaintiff to proceedings pending in the United States District Court for the Middle District of Pennsylvania in Civil No. 71-416, filed September 24, 1971, having moved for:

(i) modification of Order No. 445 so as to exclude its application to the aforementioned proceeding in the United States District Court for the Middle District of Pennsylvania;

(ii) leave to maintain the aforementioned action in the United States District Court for the Middle District of Pennsylvania; or

(iii) a stay on appeal of the injunctive provisions of Order No. 445, and the matter having come on for a hearing, and all parties in interest having been heard or given the opportunity to be heard, and good cause showing, it is on this 19th day of January, 1972,

ORDERED that the aforementioned motions be and the same are hereby denied.

ANTHONY T. AUGELLI
ANTHONY T. AUGELLI, C.J.U.S.D.C.